

Hypnosis in the Criminal Case: Facts and Fallacies

Phyllis E. Amabile, J.D., M.D.
Thomas H. Jobe, M.D.

INTRODUCTION

Throughout the past century, criminal cases have been documented in which a party has sought to introduce into evidence information obtained through the process of hypnosis. The usefulness of the technique of hypnosis in various psychological therapies has already been well established. The courts, however, have differed markedly in their decisions on the admissibility of hypnotic material into evidence. Consequently, no clear rationale or guidelines for admissibility have been established.

An essential distinction exists between the psychological therapies and criminal prosecutions, a distinction which must be understood before meaningful guidelines for admissibility can be established. The historical accuracy of a person's recollections are crucial as evidence in a criminal case, but accuracy is not crucial to the course of therapy. The psychodynamic significance of the material is more important in therapy than its correspondence to reality. This distinction raises an important concern: Is information obtained through the hypnotic process reliable? Both experimental and clinical findings point to the conclusion that hypnotic recall cannot be considered factually accurate. Furthermore, the hypnotic process improperly conducted can have deleterious psychological effects. Therefore, information obtained through hypnosis should only be admissible into evidence in well-defined circumstances, and only when safeguards are taken to minimize unreliability and undue influence on the jury. Because the courts' rulings on hypnotic material have continued to conflict, unreliability and undue influence continue to be special dangers posed by the use of hypnotically-enhanced recall in the criminal courts. To illustrate a typical setting in which these issues arise, we shall begin with a brief description of a 1983 Illinois criminal case (1).

In the summer of 1981 in the village of Wheeling, Illinois, a 14-year-old girl was beaten and murdered by means of strangulation. Three other teenagers who had been with her the previous evening were questioned by police, who learned that the youths had engaged in sexual games during which she had rebuffed 14-year-old Billy Boyd's advances. When questioned, Boyd became confused and nervous, which aroused suspicion. The boy was taken to police

Dr. Amabile is a fourth-year resident at the University of Illinois at Chicago. Dr. Jobe is an Associate Professor of Psychiatry at the University of Illinois at Chicago.

headquarters without legal counsel, separated from his parents, and told several times that the police "knew he had done it." Boyd, by now alarmed and very upset, denied the accusations but had complete amnesia for the events that occurred during a portion of the previous night.

The police contacted a former policeman who had become a psychotherapist, explaining to the Boyd family that the therapist "would help Billy." The therapist covered the shivering boy with a blanket and told him that he was there to "help him remember." He then instructed Boyd to lie down, close his eyes, take deep breaths, and to relax while keeping his mind alert. The boy was next told to "take his mind back" to the forgotten events of the prior night. Within a short time, Boyd had confessed to having suffocated the victim with a pillow. The therapist then brought Boyd to his mother and the police, announcing that the boy had something to tell them. A written confession was signed by Boyd that evening, and he was subsequently charged with murder. Over a year later, the boy's defense counsel argued dramatically at preliminary hearings that the confession should be suppressed as involuntary—a product of fantasy brought on by hypnotic suggestion.

The *Boyd* case presents numerous complex psychiatric, legal, and ethical questions. Was Boyd's confession obtained as a result of the process of hypnosis? If so, could the information be considered reliable? Was Boyd's confession made involuntarily, and were his civil rights violated? Could the confession have been made contrary to Boyd's best legal interests, but in the service of a strong psychological need on his part? Beyond the technical legal and psychiatric issues, did the therapist act in an unethical fashion by failing to act in his patient's best interest and in failing to protect confidentiality?

These issues specific to the *Boyd* case are also germane to the difficult problems created when hypnosis is used beyond the purely psychotherapeutic setting. In psychological therapies, hypnosis has been used to obtain better relaxation, explore fantasy, enhance the recall of forgotten material, and to achieve control over certain physiological processes. In those situations, whether or not material divulged by the patient is historically accurate is not necessarily crucial to the success of the therapeutic process. Likewise, problems of potential involuntariness, violations of civil rights, and conflicts regarding confidentiality rarely arise. However, when hypnosis is utilized to obtain information for use in an adversarial context with potential profound legal consequences, those problems are rarely avoided (2).

The following discussion will begin with a review of some of the hypnosis research that has been done, highlighting hypotheses regarding the psychological processes involved. Conclusions will be drawn concerning the validity and reliability of information obtained through hypnosis. A review of a sampling of case law regarding the use of hypnotic material as evidence in criminal cases will follow. Finally, conclusions will be drawn regarding appropriate safeguards and their incorporation into the law.

THE NATURE OF THE HYPNOTIC PROCESS

Sigmund Freud studied the process of hypnosis and stressed an important link between hypnosis and the unconscious. He was fascinated by an experiment he had had witnessed in France in which it was suggested to a hypnotized subject that once awakened, he would use an umbrella indoors. The subject carried out the suggestion, giving absurd explanations for his behavior which indicated that he was not conscious of his real motives. The experiment seemed to demonstrate through the use of posthypnotic suggestion that certain processes do exist outside of consciousness. Hypnosis eventually was the vehicle through which Freud discovered transference (the affective link between hypnotist and subject was seen as a transference manifestation). Freud later realized that the transference explanation did not account for the entire hypnotic experience, such as modifications of psychophysiological behavior. Nevertheless, those modifications further demonstrated to him some existing link between hypnotic experience and the unconscious (3) (see also Chertok [4]).

Since the late nineteenth century, there has been debate over the question of whether a person's ability to enter a hypnotic state indicates some neurological and mental dysfunction, or is a normal psychological phenomenon. In a recent study, Spiegel et al compared the hypnotic responsivity of chronically ill psychiatric patients with that of non-patient volunteers and found that greater hypnotizability is associated with relative mental health. The authors concluded that the hypnotic state is a complex process requiring attentive focal concentration, a suspension of peripheral awareness, and hence, intact mental functioning (5).

Mott views hypnosis as a facilitator of various treatment methods rather than as a treatment in itself. He emphasizes that the subject may respond to appropriate suggestions with distortions of perception or memory and a suspension of critical judgment. As a result of hypnotic suggestion, a person may produce a response without voluntary awareness—a "nonvolitional response," in Mott's opinion. Furthermore, a successful hypnotic induction is seen to create confidence and faith in the therapist, an expectation of relief, and an uncritical acceptance of the therapist's belief system (6). If these views are accurate, their implications for the reliable use of hypnotic material in criminal cases are troubling. The question of reliability will therefore next be examined in more detail.

IS RECALL UNDER HYPNOSIS RELIABLE? IS HYPNOSIS SAFE?

Putnam devised an experiment which showed that eyewitnesses questioned under hypnosis are more likely to answer leading questions incorrectly than those questioned in the waking state (7). Zelig and Beidleman substantiated

those findings in a more carefully controlled study which tested the recall of subjectively stressful material (8). The latter study also demonstrated that those subjects who scored highly on hypnotic susceptibility scales rated themselves highly confident of the accuracy of their recall under hypnosis. It seems, then, that in the hypnotic state, subjects are much more easily influenced by leading questions (which suggest an incorrect response), and are consequently more likely to recall what they have witnessed inaccurately. Putnam explains these phenomena by a "reconstructive theory" of memory, in which information acquired about an event after it has been witnessed is apparently integrated into the subject's representation of it. Eventually, the subject cannot distinguish between what actually occurred and what was subsequently suggested to have occurred. Furthermore, Zelig and Beidleman's work indicates that those who are the most susceptible to hypnosis (and hence to suggestibility) have more confidence in the accuracy of their hypnotic "memories," despite their more frequent inaccuracy. These two studies seem to substantiate Mott's view of the hypnotic state's distortion of memory and suspension of critical judgment.

DePiano and Salzberg (9) conducted an experiment which at first glance appears to contradict the Putnam, Zelig, and Beidleman results. They found that hypnotic induction enhanced the total recall of information that was meaningful, sequential, and incidentally learned. However, DePiano and Salzberg ignored all the incorrect responses given by the hypnotized subjects, totalling only correct responses. It is conceivable that while the total amount of recall was greater with hypnotic induction, a higher percentage of the recall was incorrect than in the waking state. The study does not refute Putnam, Zelig, and Beidleman's work and does not shed light on the question of the reliability of recall in hypnosis.

Orne, who has studied hypnosis extensively, indicates that hypnosis does modestly increase the amount of material available to memory (hypnotic hypermnesia) (10). At the same time, it increases the tendency to "fill in" portions which the subject or witness cannot remember in an effort to comply with suggestions (confabulation). Orne explains these phenomena as a consequence of the hypnotized person's decrease in critical judgment and acceptance of approximations of memory as accurate. In the waking state, a person exerts more critical judgment and would be unwilling to consider approximate memories as acceptable recall.

Orne points out an additional problem: Following hypnosis, a person tends to confound hypnotic memories with waking memories and, in essence, "creates memories." Each time they are relayed, the "memories" are recalled with greater conviction. A stabilization of the person's recollections occurs, making effective cross-examination of a previously hypnotized witness very difficult. Worthington (11) elaborates on this point, highlighting the accused's Sixth Amendment right to confront one's accusers by cross-examination. Given the alteration and stabilization of memory that can occur under hypnosis, a witness

could become impervious to cross-examination and effectively deny the accused that opportunity.

The findings of various hypnotherapists, based upon their work with witnesses or victims of crime, substantiate the experimental findings already discussed. They delineate three existing problems: unreliability of information gathered, the possibility of coercion, and potential harm to a subject from the hypnotic process when improperly conducted.

Kroger and Doucé have used hypnosis to obtain investigative leads from witnesses or victims of crimes (12). They describe several factors important for the successful induction of hypnosis. The subject must be relaxed, the prestige of the hypnotist in the subject's eyes must be enhanced, and the subject's strong motivation to remember information must be reinforced. However, on the basis of their experiences working for law enforcement agencies, these authors point out several pitfalls. Subjects may simulate the hypnotic state, may confabulate or fantasize while under hypnosis, and may even consciously lie. Furthermore, even very experienced hypnotists cannot readily recognize hypnotic simulation or confabulation. They conclude that hypnosis as an investigative tool should never be used with suspects of crimes, nor as a means of distinguishing fact from fantasy. All information gathered through hypnosis must be corroborated and validated by other evidence.

An intriguing question exists as to whether hypnosis can be used to coerce a subject's behavior. The issue has been raised several times in criminal prosecutions for rape, where the victim charged she had been hypnotized and then coerced to engage in sexual acts. If indeed such coercion were possible, then perhaps a suspect could be coerced into a hypnotic false confession of criminal guilt. In fact, investigators are in disagreement over the coercive potential of hypnosis. Those who deny that coercion can occur believe that hypnosis merely provides a license for the hypnotized person to act out pre-existing desires. Those who ascribe to the belief of coercive potential have suggested that several factors may need to exist in combination. First, the subject believes that all initiative and self-determination in hypnosis are surrendered to the hypnotist. Second, the behavior suggested to the subject taps some underlying motives of which he may not even be aware. Third, the suggestion involves some act over which the hypnotized person normally experiences some conflict (13). Criminal activities are behaviors for which individuals may feel some motivation and over which they may experience conflict. One could postulate, then, that a person could be coerced to commit a crime or even to make a false confession of criminal acts. The latter might particularly be true when the person harbors strong feelings of guilt which confession and punishment might serve to assuage.

Hypnotherapists have reported that complications from the hypnotic process are common. For example, hypnosis may precipitate or exacerbate existing psychopathology, and may result in sudden panic reactions or substitute symp-

tom formations. Several cases have been reported in which a subject failed to awaken from the trance state, apparently in situations where the hypnotist was antagonistic or indicated by his behavior that the subject's best interests were not his primary concern (14).

A case of severe posthypnotic trauma has been reported in a teenage girl who participated in hypnosis performed as part of an entertainment program (15). Following the demonstration (which included the command that she make her body "stiff as a steel rod" to support the hypnotist's weight), the girl lapsed into a nonresponsive, stuporous state with total anesthesia for nine days. She was hospitalized, catheterized, fed intravenously, and developed urinary and upper respiratory infections. The hypnotherapist who later successfully performed dehypnosis procedures on the girl discusses the inherent danger of trauma whenever a trance experience is induced for some goal other than the subject's welfare. He also emphasizes the dangers in a hypnotist's lack of awareness of possible links between his suggestions and the underlying personality and developmental conflicts of an adolescent subject.

Both experimental and clinical material, therefore, point to the conclusion that information obtained from a person while in the hypnotic state cannot be considered accurate. Furthermore, a person could be subjected to some untoward and potentially long-lasting psychiatric complications as a result of the hypnotic induction.¹ These conclusions have important implications for the *Boyd* case discussed earlier. There was no evidence linking Billy Boyd to the murder other than his hypnotic confession of guilt and a possible motive: His having been sexually rejected by the victim. Indeed, the medical examiner's testimony indicated that the victim could not have been suffocated with a pillow, and that bite marks on the victim's breast could not have been made by Boyd. Nevertheless, on the basis of his confession, consisting of hypnotic information that was inherently unreliable, the boy was charged with murder. Ironically, the sexual activities which led investigators to hypothesize Boyd's motive for committing the murder may have led him to falsify a confession. One could postulate that developmental conflicts over sexual matters which adolescents experience were exacerbated when Boyd's advances were rebuffed by the girl. His sexual urges and the anger he must have experienced at being rejected may have given rise to strong feelings of guilt. Boyd's hypnotist was consoling, had a protective demeanor, and promised the boy he would "help" him. Those factors may have been crucial in precipitating Boyd's confession—a confession which may have served a strong psychological need by assuaging guilt over sexual and homicidal impulses.

¹ A similar conclusion was drawn by the AMA Council on Scientific Affairs in Council Report: Scientific Status of Refreshing Recollection by the Use of Hypnosis, *JAMA*, 253:1918–1923, 1985.

HYPNOSIS AND THE MULTIPLICITY OF LEGAL OPINION

Since at least the early 1900's, criminal courts in this country have grappled with the question of the admissibility of hypnotic material into evidence. The wide discrepancies in legal reasoning and the inconsistencies of outcome in these cases are striking (16). The issue of admissibility of hypnotic material in criminal cases arises generally in one of three broad contexts. Most frequently, the court is requested to admit the testimony of a witness whose memory of the crime was purportedly restored or induced through hypnosis. In other cases, the admissibility of the testimony of a hypnotist is considered when the hypnotist has formed an opinion of the accused's guilt, state of mind, or reliability based on several hypnotic interviews. Least commonly, pre-trial statements made by the accused while hypnotized are sought to be admitted into evidence. Representative case law will be discussed to illustrate each of these three factual contexts and the inconsistency of decisions in the courts.

Witness Testimony. Witnesses (including victims of crime) who purport to have had their memories refreshed or induced by hypnosis have often been allowed to testify. In *Harding v. Maryland* (17), for example, a victim of rape and attempted murder who was amnesic for the events recollected them under hypnosis prior to trial. The witness was permitted to testify from her "present recollections" (having been refreshed by hypnosis) and it was largely on the basis of her testimony that the defendant was convicted. The *Harding* court reasoned that the fact that the witness achieved her knowledge of the events through a process of hypnosis concerned only the weight her testimony should be afforded by the jury, and not its admissibility into evidence. Accordingly, the trial court gave a precautionary instruction to the jury regarding the recollection based on hypnosis, telling them "not to place any greater weight on this . . . than on any other testimony . . . heard during the trial."

In *People v. Harper* (18), the Illinois Appellate Court affirmed a lower court's decision not to allow in evidence a witness' statement made under the influence of a "truth serum" (sodium amobarbital) identifying the defendant as her attacker. The prosecution argued that the statement should be admissible in evidence based on the reasoning of the *Harding* decision, but the court rejected the argument, saying:

We see no reason to equate examination under hypnosis and examination under the effect of a . . . 'truth serum' except to note that the scientific reliability of neither is sufficient to justify the use of test results of either in the serious business of criminal prosecution.

Despite the strong statement of the *Harper* court about the scientific unreliability of hypnosis, the Illinois Appellate Court took a different stance in a more recent, similar case. In *People v. Smrekar* (19), a prosecution witness had originally been unable to identify the defendant, whose photograph was one of

six shown to her. Following hypnosis, however, the witness selected the defendant from a line-up of 40 men, and further positively identified him in court. The defense claimed that hypnosis had tainted the witness' later identifications, so as to make her testimony inadmissible, but the court concluded that the fact of prior hypnosis should have a bearing not on admissibility, but only on the credibility of the witness. The reasoning of the *Smrekar* decision, then, was similar to that of *Harding*, previously discussed.

Given that both experimental and clinical data indicate that in hypnosis there is very strong suggestibility, decrease in critical judgment, danger of confabulation, and later stabilization of the "memory," these court decisions are troubling. While the dangers of witnesses' distorting and confabulating are ever present in waking states, those dangers are enhanced via the process of hypnosis. In the interest of minimizing unreliable testimony in cases where the defendant's life or liberty may be at stake, the courts need to apply stronger safeguards than they generally have. For example, the *Harding* court's caveat that the jury should not afford the hypnotic material "greater weight" than other testimony implied to the jurors that the material was at least as reliable as other testimony. In fact, research has indicated that it is less reliable. At a minimum, then, the court should instruct the jury on the *special* dangers inherent in statements made during hypnosis and in testimony given after hypnosis, so that they might weigh them more appropriately. Further safeguards will be discussed under *Testimony of the Accused*, below.

Hypnotist Testimony. Several courts have had to determine whether a hypnotist should be allowed to testify as to his opinions based upon pretrial hypnotic interviews with the accused. In *Harding v. Maryland* (17), the amnesic witness' hypnotist was allowed to testify that on the basis of his four years of experience in hypnosis, he "seriously doubted suggestibility" and that there was no reason to doubt the truth of the witness' statements based on her refreshed recollections. Even more striking is a decision by the California Appellate Court in *People v. Marsh* (20), wherein the defendant, charged with escaping from prison, claimed that a fellow prisoner had hypnotized him and suggested he escape. The *Marsh* court permitted a psychiatrist skilled in the use of hypnosis to testify that, merely on the basis of observing the defendant in court, she was of the opinion that he was not readily hypnotizable. She further testified that the age regression suggestions which the defendant had received while hypnotized would not have caused him to escape.

Other courts have dealt with the admissibility of hypnotists' opinions much more restrictively than the *Harding* and *Marsh* courts. For example, in *People v. Busch* (21), where the trial court had convicted a defendant of murder, the California Supreme Court affirmed the lower court's decision to exclude a physician's testimony. The physician was of the opinion, based on 13 pretrial interviews with the hypnotized defendant, that the latter was unable to have formed an intent to kill and did not premeditate. The supreme court noted that hypnosis was "an analytical tool . . . of questionable reliability." Similarly, courts

have disallowed hypnotists to testify to their opinion of the truthfulness of a defendant's statements regarding his guilt or innocence made under hypnosis.

Many commentators who have studied hypnosis in the experimental or clinical setting have noted the difficulty that even experienced hypnotists encounter in attempting to discern simulation, confabulation, and lying. Furthermore, methods do not exist whereby these phenomena could be readily discerned. Allowing the hypnotist, an "expert witness," to testify to a jury regarding his opinion of the accused's guilt, innocence, truthfulness, or state of mind, serves to further enhance in the jury's mind the significance of inherently unreliable hypnotic information. Not only is the hypnotist unable to discern confabulation and distortion of facts in his hypnotized subject, his view of the accuracy of the statements may be unduly biased because of his involvement in the process. Such potentially influential and misleading testimony at criminal trials should be disallowed.

Testimony of the Accused. On occasion, either the prosecution or defense has sought to admit into evidence statements made prior to trial by the accused while hypnotized. In *People v. Hangsleben* (22), a teenaged boy was convicted of murdering two young girls, partly on the basis of a confession he made to the police. The trial court had denied the defense's request to admit evidence of a tape recorded hypnosis session that followed the confession of guilt, during which the boy recalled that another had committed the murders. In affirming the trial court's decision, the appellate court determined that the material was inadmissible both for the purpose of establishing the truth of the hypnotic statements and for the purpose of bolstering the credibility of the defendant's story at trial. The court noted the unreliability of hypnotic recall as well as the dangers of misuse and misinterpretation by the jury.

A 1954 United States Supreme Court case, *Leyra v. Denno* (23), held that not only was a hypnotic confession of murder extracted from an exhausted suspect inadmissible, but the confessions made immediately subsequent to the hypnosis were inadmissible as well. Both were viewed as involuntary and in violation of the Due Process Clause of the Fourteenth Amendment. The facts which the *Leyra* court enumerated as crucial to its decision bear a very striking similarity to the events which occurred in the *Boyd* case (1). In *Leyra*, the suspect (a son of the murder victims) was questioned intensively for long periods of time, and was suffering from both physical exhaustion and a painful sinusitis. Interrogators told him a medical doctor was being called in to "help." The physician, who was highly skilled in hypnotic technique, told the suspect that he would feel much better if he unburdened himself to the doctor. Following the suspect's confession made while in a hypnotic state and without legal counsel, the physician immediately called in the police chief and the suspect's business partner so that the confession could be repeated.

Similarly, William Boyd was questioned for long hours out of the presence of his parents and without legal counsel, and was told several times that the police "knew he had done it." He was fatigued and shivering when he was

offered the opportunity to be "helped" by a doctor. The therapist spoke to Boyd in a comforting, reassuring manner that appeared to calm the boy. With very little prompting or suggestion from the therapist (unlike in the *Leyra* case), the boy confessed to his guilt. Immediately thereafter, the therapist called in the police and Boyd's parents so that the confession could be repeated.

Boyd's confessions (those made to the therapist and later to the police) were suppressed at preliminary hearings. Shortly thereafter, charges against the boy were dropped. In light of the Supreme Court's strong statement in *Leyra*, it is puzzling and disturbing that Boyd was subjected to the treatment he was, and that murder charges were even brought against the boy on the basis of his hypnotic confession. One could argue that his Fourteenth Amendment Due Process rights were violated no less than those of the suspect in *Leyra*. One of the court's aims in disallowing evidence obtained in violation of Constitutional rights is to discourage further such violations in the course of investigations. Despite the court's opinion in *Leyra*, however, investigators and hypnotists have apparently not uniformly incorporated safeguards into their investigative use of hypnosis. As a result, a 14-year-old was subjected to an extremely stressful chain of events with potential long-lasting psychological consequences.

It is reassuring to note that the courts have generally refused to admit into evidence pretrial statements made by the accused while hypnotized. The dangers of inaccuracy, confabulation, and simulation are exacerbated by the accused's urgent, personal stake in the outcome of the trial. Likewise, the dramatic emotional stress which a person must experience upon being named a suspect and subjected to intense questioning introduces unknown factors into the hypnotic process which are neither understood nor controlled. Reliability of the information cannot be safely assumed. The jury is apt to consider this part of the evidence very seriously since the defendant's own statement as to his guilt or innocence is of particular interest. Because the risks of inaccuracy and undue influence on the jury are so great, and because the jury's ultimate decision has such profound consequences, even a precautionary word to the jury would be an insufficient safeguard. Hence, the accused's pretrial hypnotic statements made in a factual setting at all similar to *Leyra* or *Boyd* should be absolutely disallowed.

If an accused's hypnotically-induced or refreshed statements were made under conditions far less stressful and deceptive, conceivably they could be admissible in evidence, but only when two conditions are met. First, certain minimal safeguards must be employed during the hypnotic interview, as described by Orne (9). These include a hypnotist who is specially trained and has no role in the investigation, a videotaping of all contact between the hypnotist and subject, and complete privacy during the hypnotic sessions.² Additionally,

² The Supreme Court of New Jersey ruled that adherence to similar specific guidelines is required in order for hypnotically refreshed memories to be admissible. *State v Hurd*, 173 NJ Sup Ct 333, 414 A2d 291, aff'd, 86 NJ 525, 432 A2d 86 (1981).

there must be no coercion, intimidation, leading questions, or other undue influence. These requirements would hold for *any* witness' hypnotically induced or refreshed statements. Second, the jury must be given a precautionary statement as to the special dangers inherent in the hypnotic process regarding reliability.

CONCLUSION

Although hypnosis has been employed in multiple ways with beneficial effects in the course of psychological therapies, it is a mistake to assume that hypnosis can be easily integrated into legal evidence in criminal cases. In the course of therapy, absolute distinction between accuracy and distortion of recall is not crucial to the treatment outcome. In fact, in psychodynamically-oriented psychotherapies, hypnosis is used primarily to gain access to the patient's fantasy life. Criminal proceedings present a different set of problems and potential consequences; the distinction between accurate and inaccurate testimony is crucial. It is the responsibility of the courts to guard against the introduction of unreliable testimony whenever possible. A closer look at both experimental and clinical findings on hypnosis, and an incorporation of those findings into their decision-making would behoove the courts. Similarly, therapists who employ hypnosis must familiarize themselves with its inherent weaknesses and dangers, lest they unwittingly fail to protect their patients' best interests.

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